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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Customs and Patent Appeals.

Motion of Craig Corporation, Superscope, Inc., Marantz Company, Inc., Akai America, Ltd., Clarion Corp. of America, J.I.L. Corp. of America, Inc., Kenwood Electronics, Inc., Pioneer Electronics of America, Sanyo Electric, Inc., Kraco Enterprises, Inc., Association of Electronic Importers, and Foreign Trade Association of Southern California for Leave to File Brief as Amici Curiae and Brief of Amici Curiae in Support of Dismissal on Grounds of Unconstitutionality of 19 U.S.C. § 1516(d).

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by respectfully move for leave to file the attached brief as *amici curiae* in this case. The consent of the attorneys for the petitioner and the respondent was requested but refused. These refusals are symptomatic of *Amici's* basic complaint that *Amici* have been excluded from participation in this litigation from the outset notwithstanding that they are the entities who will be most directly affected by the outcome.

Amici and others similarly situated import Japanese electronic products upon which countervailing duties will be imposed if the Zenith Radio Corporation prevails in this litigation.* They are, *de facto*, the real parties in interest in this dispute. Nevertheless, the statutory provision under which this litigation has been pursued fails to allow participation by the parties who will have to pay the countervailing duties which Zenith seeks to have imposed.

Amici seek to raise an issue which has not been raised by either party to these proceedings—the constitutionality of 19 U.S.C. § 1516(d) under which Zenith has brought this action. Neither of the litigants has any motivation for considering this issue. Zenith Radio Corporation is undoubtedly comfortable with a procedure which allows it to bring this action unencum-

*All of the individually named *Amici* are United States companies which import large quantities of Japanese consumer electronic products of the type which will be subjected to countervailing duties if Zenith Radio Corporation prevails in this litigation. *Amicus* Association of Electronic Importers is an organization of thirteen of the largest United States firms which import such Japanese electronic consumer products. *Amicus* Foreign Trade Association of Southern California is an association of more than 460 importing, exporting and service firms engaged in international trade, vitally interested in the impact and effect of this litigation on international trade.

bered by opposition from the parties upon which they seek to impose substantial competitive disadvantages. The United States Department of Justice is not likely to be interested in arguing that a federal law is unconstitutional because of its obligation to uphold and defend such laws. Yet the issue must be considered because, if *Amici* are correct, a binding decision imposing countervailing duties cannot be rendered in the case now before the Court.

Amici respectfully submit that the issue which they seek to raise cannot be avoided and considerations of fairness, justice and judicial economy require that it be considered at this time.

Respectfully submitted,

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Brief of Amici Curiae Craig Corporation, Superscope, Inc., Marantz Company, Inc., Akai America, Ltd., Clarion Corp. of America, J.I.L. Corp. of America, Inc., Kenwood Electronics, Inc., Pioneer Electronics of America, Sanyo Electric, Inc., Kraco Enterprises, Inc., Association of Electronic Importers and Foreign Trade Association of Southern California.

Interest of Amici Curiae.

Craig Corporation, Superscope, Inc., Marantz Company, Inc., Akai America, Ltd., Clarion Corp. of America, J.I.L. Corp. of America, Inc., Kenwood Electronics, Inc., Pioneer Electronics of America, Sanyo Electric, Inc. and Kraco Enterprises, Inc. are United States companies which import large quantities of Japanese consumer electronic products upon which substantial countervailing duties will be imposed if this Court reverses the decision of the United States Court of Customs and Patent Appeals in this case.

Amicus Association of Electronic Importers is an organization of thirteen of the largest United States firms importing Japanese electronic consumer products upon which countervailing duties in amounts totaling over fifty million dollars will be imposed if this Court reverses the decision of the United States Court of Customs and Patent Appeals in this case.

Amicus Foreign Trade Association of Southern California is an association of more than 460 importing, exporting, and service firms engaged in international trade and vitally interested in the impact and effect this litigation has had and will have on the importing industry and international trade. The members of the Association include more than 110 firms engaged in

importing products from various countries throughout the world, including many members importing Japanese consumer electronic products.

On April 12, 1977, the United States Customs Court determined that the exemption from taxes of certain electronic products when exported from Japan granted by the Commodity Tax Law of Japan constitutes the payment or bestowal of a bounty or grant within the ambit of Section 303 of the Tariff Act of 1930, as amended (19 U.S.C. § 1303). It ordered customs officers throughout the United States to immediately assess countervailing duties on such products upon their importation into the United States.

Amici, and others like them, are the importers of these products. They are the parties which will be required to pay the substantial duties which will be imposed if the Customs Court decision is upheld. Such duties will increase the cost of these products to the importers and ultimately to the consumers. The competitive disadvantage to *Amici,* if duties ranging from 5 to 40% are added to the cost of goods sold, is self-evident.

Of all the interests which will be affected by the outcome of this litigation, only those of the importers have been unrepresented. The American manufacturers of comparable products have been ably and vigorously represented by the Zenith Radio Corporation (hereinafter "Zenith"). The interests of public and foreign policy are represented by the United States. However, the parties who must pay the duties and whose sales of products have been and will be directly influenced by this litigation have been denied an opportunity to be heard. There is no one presently before this

Court who has any interest in pointing out that the procedure which brings this dispute to this Court is constitutionally defective. Only *Amici* can effectively do so.

Summary of Argument.

Under either 19 U.S.C. § 1516(c) or (d), as amended by the Trade Act of 1974, an American manufacturer may contest a decision of the Secretary of the Treasury *not* to impose countervailing duties (a decision which is commonly referred to as a "negative determination"). In § 1516(c) proceedings, the American manufacturer is the plaintiff, the United States is the defendant, and the importer of the goods in question participates as the real party in interest (19 U.S.C. § 1516(f)). In § 1516(d) proceedings (such as in the present case), the American manufacturer is the plaintiff, and the United States is the defendant, but *importers of the goods subject to countervailing duties are not parties.* Under § 1516(d), importers who may be subjected to countervailing duties are not allowed to participate in the judicial process which bears directly upon their interests.

Section 1516(d) violates the guarantees of procedural due process accorded by the Fifth Amendment to the Constitution of the United States because *Amici* and all those similarly situated are deprived of notice of or any meaningful opportunity to be heard in this judicial proceeding brought by one of their competitors, Zenith, against the Secretary of the Treasury, which proceeding directly affects their interests by exposing their goods to the imposition of countervailing duties. Section 1516(d) also violates the equal protection guarantees of the Constitution. Access to the courts is

a fundamental constitutional right. There is no compelling interest nor any rational reason justifying the exclusion of *Amici* from § 1516(d) proceedings. Allowing one interest access to the courts while denying access in the same proceedings to all interests who wish to assert contrary positions and who are even more directly affected by the outcome of the dispute is an unconstitutional violation of equal protection.

ARGUMENT.

A. Importers of Goods Subject to the Imposition of Countervailing Duties Are Denied Due Process Because They Cannot Participate in Proceedings Pursuant to 19 U.S.C. § 1516(d).

An appreciation of the procedures whereby countervailing duty determinations are made and challenged is fundamental to an analysis of the constitutional issues raised by *Amici*. Section 1303 of Title 19, United States Code, sets forth the circumstances pursuant to which countervailing duties are to be imposed and provides an administrative procedure which allows any person an opportunity to seek to assert administratively the position that the imposition of such duties are required in particular circumstances. If imposed, the countervailing duties may be challenged by an importer only after liquidation of its entries of the affected imported merchandise. If not imposed, an American manufacturer may challenge the negative determination pursuant to the procedures set out in 19 U.S.C. § 1516 (c) or (d).

Section 1516(c) establishes a procedure which involves the importer, the American manufacturer and the United States. The refusal by the Secretary of the Treasury to impose countervailing duties on specific imported merchandise provides the focus for the litigation. Section 1516(d), on the other hand, allows an American manufacturer to initiate a general challenge of a negative determination by the Secretary of the Treasury without regard to any specific shipment, in litigation which does not contemplate participation by importers. If the decision in litigation brought under § 1516(d) is adverse to importers, their goods imported subsequent to the effective date of the Customs Court

decision will be subjected to countervailing duties. When the duty assessment process is completed and the entries of such goods are liquidated (finalized by the United States Customs Service), the importers are *then* permitted to challenge the imposition of countervailing duties on specific goods in specific shipments by protests under 19 U.S.C. §1514. Only after the protests have been denied under 19 U.S.C. §1515 may litigation be initiated in the United States Customs Court under 28 U.S.C. § 1582(a) and (c), long after there has been a judicial decision upon the legality of the imposition of the countervailing duties.

The instant litigation is a classic example of the workings of Section 1516(d). The American manufacturer, Zenith, has been able to prosecute this action solely against the government, unhindered by the opposition of the importers upon whose goods the duties are to be imposed. If this Court decides that countervailing duties should be imposed in this case, the very importers who must pay the duties will not have an opportunity to challenge the impost until after their entries are liquidated. At that time, they will be in the untenable position of presenting to the Customs Court issues which *the United States Supreme Court has already resolved.*

The Fifth Amendment to the Constitution of the United States prohibits the government from depriving any person of "life, liberty, or property without due process of law." *Amici's* imports are, of course, property for Fifth Amendment purposes because *Amici* are entitled to the ownership and control of such goods under state law (*Board of Regents v. Roth* (1972), 408 U.S. 564, 571, 33 L.Ed.2d 548, 557). In addition,

since 1898, the government has uniformly refused to impose countervailing duties as a consequence of the non-excessive remission of taxes by a foreign country upon the exportation of such products to the United States (*United States v. Zenith Radio Corp.* (1977), 64 CCPA ...., C.A.D. 1195, 562 F.2d 1209, 1218-1219, *cert. granted,* No. 77-539, 46 U.S.L.W. 3511 (Feb. 21, 1978)). This 80-year-old administrative interpretation, dating from only one year after the passage of 19 U.S.C. § 1303, created an extant rule and understanding giving rise to *Amici's* Fifth Amendment property interest in their imports (*Perry v. Sindermann* (1972), 408 U.S. 593, 601, 33 L.Ed.2d 570, 580 and *Pence v. Kleppe* (9th Cir. 1976), 529 F.2d 135, 141).

Amici have been deprived of their property without due process because they were not given notice or a meaningful opportunity to participate in the instant Section 1516(d) proceeding. Squarely on point is *Armstrong v. Manzo* (1965), 380 U.S. 545, 14 L.Ed. 2d 62. In *Armstrong,* Petitioner challenged the validity of his ex-wife's adoption of their child on the ground that he had been given no notice or opportunity to be heard in the adoption proceedings. This Court unanimously held:

> "A fundamental requirement of due process is 'the opportunity to he heard.' [Citation omitted] *It is an opportunity which must be granted at a meaningful time and in a meaningful manner.* The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the [adoption] decree and consider the case anew. *Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied*

had due process of law been accorded to him in the first place. His motion should have been granted." [Emphasis supplied]

Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed.2d 62, 66-67

The holding in *Armstrong* is precisely dispositive of the issue raised by *Amici.* In the instant case, when and if *Amici* finally obtain a hearing in the Customs Court to argue that countervailing duties should not be imposed on their goods, they will be faced with factual and legal determinations by the United States Supreme Court that the electronics products they import from Japan are subject to countervailing duties. With the facts and law having already been determined against them by the highest court in the land, *Amici* could not possibly obtain a *meaningful* opportunity to be heard in the Customs Court. Such a hearing *after* the judicial "slate" has already been covered with factual and legal findings against them violates the principle articulated in *Armstrong.* Nor can the Customs Court remedy the situation because it would undoubtedly consider itself bound by this Court's decision.

The present litigation will, for all *practical purposes,* resolve the issue of the imposition of countervailing duties with respect to *Amici's* products. This is especially true in the instant circumstances because this litigation raises a question of first impression with a critical impact on international trade (*Nuesse v. Camp* (D.C. Cir. 1967), 385 F.2d 694, 702) and because it will set a nationwide policy (*Textile Workers Union of America v. Allendale Co.* (D.C. Cir. 1955), 226 F.2d 765, 767, *cert. den.,* 351 U.S. 909; *Atlantic Refining*

Co. v. Standard Oil Co. (D.C. Cir. 1962), 304 F.2d 387, 394).* *Amici* are entitled to a *meaningful* opportunity to be heard while the judicial "slate" is still clean. *Atlantic Development Corp. v. United States* (5th Cir. 1967), 379 F.2d 818, 829.

Nor can it be argued that the government is an adequate representative of *Amici's* interests in this proceeding. It is the general rule that the government is not an adequate representative of a private party's interest (*Trobovich v. United Mine Workers of America* (1972), 404 U.S. 528, 538, n. 10, 30 L.Ed.2d 686, 694, n. 10; *National Farm Lines v. I.C.C.* (10th Cir. 1977), 564 F.2d 381, 384; *Holmes v. Government of Virgin Islands* (D.V.I. 1973), 61 F.R.D. 3, 5, and *New England Petroleum v. Federal Energy Administration* (S.D.N.Y. 1976), 71 F.R.D. 454, 459).

The government is a particularly inappropriate representative of *Amici's* interest in this case because the Secretary of the Treasury is charged with the obligation of raising and collecting customs duties. 19 U.S.C. §§ 3 and 1505. He can hardly adequately represent *Amici's* interests since they challenge the imposition of countervailing duties, which would generate new revenue for the United States. Because it is his duty to uphold the laws of the United States, the Secretary has also failed to raise the important issue that *Amici* are trying to raise now, *viz.,* that 19 U.S.C. § 1516(d) is unconstitutional. By opposing *Amici's* participation, he even opposes bringing this issue to the attention

*Participation as *Amici Curiae* in this case, which has been resisted both by Zenith and the government, does not give *Amici* their right to notice and a meaningful opportunity to be heard (*New York Public Interest Research Group, Inc. v. Regents* (2d Cir. 1975), 516 F.2d 350, 352, n. 3 and *Nuesse v. Camp* (D.C. Cir. 1967), 385 F.2d 694, 704, n. 10).

of the Court. Finally, since important international policies as well as issues significant to the national economy, involving potent political forces, are involved, such factors may easily affect the arguments which the government chooses to advance or the vigor with which they are presented.

This Court has been ever mindful of the principle that the truest guarantee of just and equitable judicial decisions is full and effective participation by all directly concerned. The litigation before this Court cannot abide by that principle as long as it excludes *Amici* and other importers who will bear the direct monetary impact of any decision imposing countervailing duties.

B. Importers of Goods Subject to the Imposition of Countervailing Duties Are Denied Equal Protection Because They Cannot Participate in Proceedings Pursuant to 19 U.S.C. § 1516(d).

Access to the courts is a fundamental constitutional right embraced within the First Amendment's guarantee of the right to petition the government for the redress of grievances. *California Transport v. Trucking Unlimited* (1972), 404 U.S. 508, 510, 30 L.Ed.2d 642, 646; see also *Bounds v. Smith* (1977), 430 U.S. 817, 828, 52 L.Ed.2d 72, 83; *NAACP v. Button* (1963), 371 U.S. 415, 430-431, 9 L.Ed.2d 405, 416-417 and *United Transportation Union v. Michigan* (1971), 401 U.S. 576, 587, 28 L.Ed.2d 339, 347. This is especially true where, as here, the only way in which the dispute may be resolved is in the courts (*Boddie v. Connecticut* (1971), 401 U.S. 371, 28 L.Ed.2d 113).

A compelling governmental interest must be shown to justify the denial of *Amici's* constitutional right of access to the courts (*Shapiro v. Thompson* (1969),

394 U.S. 618, 634, 22 L.Ed.2d 600, 615)—especially where their competitors are allowed access to such courts. No such compelling interest justifies *Amici's* exclusion from the § 1516(d) proceedings. (Compare *Korematsu v. United States* (1944), 323 U.S. 214, 89 L.Ed. 194.) Indeed, the existence of Section 1516 (c), which allows a negative countervailing duty determination to be challenged in a truly adversary proceeding, implicitly recognizes that Section 1516(d) is not in any way essential to the testing of such administrative decisions. Since Section 1516(d) infringes a fundamental constitutional right—the First Amendment right of access to the courts—this Court should declare it unconstitutional because it is not justified by any compelling state interest.

In any event, § 1516(d) cannot survive scrutiny under the "lesser" equal protection standard of "some rationality in the nature of the class singled-out" (*James v. Strange* (1972), 407 U.S. 128, 140, 32 L.Ed.2d 600, 610). An after the fact rationalization cannot be created to support the constitutionality of § 1516(d) (*McGinnis v. Royster* (1973), 410 U.S. 263, 35 L.Ed. 2d 282). Rather, the challenged statute must be considered in the light of whether it rationally furthers some articulated state purpose (410 U.S. at 270, 35 L.Ed. at 289). In 1974 Congress amended § 1516(c) and enacted § 1516(d) for the express purpose of giving American manufacturers the same right to judicial review of adverse countervailing duty determinations of the Secretary of the Treasury as American importers previously had, thus overturning *United States v. Hammond Lead Products, Inc.* (1971), 58 CCPA 129, C.A.D. 1017, 440 F.2d 1024, *cert. den.*, 404

U.S. 1005 (See S.Rep. No. 93-1298, 93d Cong. 2d Sess. (1974), 4 U.S. Code Cong. and Admin. News at 7320. Cong. Rep. No. 93-1644, 93 Cong. 2d Sess. (1974), 4 U.S. Code Cong. & Admin. News at 7389). However, there is no need to exclude American importers from § 1516(d) proceedings to achieve this goal. Implicit Congressional recognition of this point is evidenced by § 1516(c), where all interested parties are litigants in proceedings brought by American manufacturers. Indeed, the government's legitimate interest in avoiding piecemeal litigation and economizing on the use of scarce judicial resources militates in favor of participation by the affected American importers in § 1516(d) proceedings, not against it. Furthermore, striking down § 1516(d) as unconstitutional will not deprive American manufacturers of the right to judicial review because they will still be entitled to such review pursuant to § 1516(c).

Where governmental action trenches upon fundamental constitutional rights, the government is required to use the least drastic alternative or means available. *Dean Milk Co. v. City of Madison* (1951), 340 U.S. 349, 354, 95 L.Ed. 329, 333, *United States v. Jackson* (1968), 390 U.S. 570, 583, 20 L.Ed.2d 138, 147, and *United States v. Robel* (1967), 389 U.S. 258, 268, 19 L.Ed.2d 508, 516-517. Section 1516(c) proves that Section 1516(d) is not the least restrictive alternative for achieving Congress' goal of providing a forum for American manufacturers to contest negative determinations of the Secretary of the Treasury.

Conclusion.

Congress has unconstitutionally (presumably inadvertently) discriminated against importers and in favor of their competitors, American manufacturers, in the enactment of § 1516(d). To provide access to the courts for the vindication of one side's interests in a dispute while excluding from participation opposing interests most directly affected by the outcome, is blatant and invidious discrimination. *Amici* cannot intervene in the Section 1516(d) proceedings because there is no provision in the law or in the Rules of the Customs Court for intervention, nor may such a provision be implied on the basis of Federal Rule of Civil Procedure 24 (*Airco, Inc. v. U.S.* (unpublished order of U.S. Customs Court dated December 12, 1977, Civ. No. 76-3-00643, in which, revealingly, the Justice Department successfully opposed intervention by the importer).

This Court has recognized the extreme importance of the substantive issues raised by this litigation by establishing an expedited schedule for this case. However, irrespective of the importance of these substantive questions, it would be a disservice to all concerned to render a decision regarding countervailing duties which cannot be binding upon those who must pay the duties because they have been deprived of the fundamental right under the due process and equal protection clauses to participate in the judicial proceedings leading to this decision. The confusion and uncertainty, perhaps chaos, which would result from such a decision in a defective proceeding would be satisfying to no one

and would not put the issue to rest. *Amici* would, of course, be severely prejudiced in attempting to argue against the imposition of countervailing duties with respect to their products, even in this Court, if the merits had already been decided.

It is submitted that this Court's only recourse is to dismiss the instant proceedings on the ground of Section 1516(d)'s unconstitutionality and allow this dispute to arise in a context in which all interested parties are allowed to participate.

Respectfully submitted,

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